United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLEE

608

United States Court of Appeals
For the District of Columbia Circuit

No. 22,219

RONALD A. RICHMOND, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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v.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

FILED FEB 3 1969

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3 Wigmore Section 944 (3d ed. 1940) 15

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

1. Whether the trial judge erred in ruling, after thorough examination into the photographic identification procedure at which complaining witness Brooke identified appellant's picture, that the procedure was not conducive to mis-identification where only three of the approximately ten to twelve pictures shown were available in court.

2. Whether, assuming the photographic identification procedure denied due process, the complaining witness' in-court identification of appellant as assailant had a source independent of the photographic identification.

3. Whether, assuming that the photographic identification procedure denied due process and that the in-court identification had a source independent of the photographic identification, the introduction of the out of court photographic identification was harmless error.

4. Whether the trial judge erred in sustaining Government objection to defense counsel's question propounded to complaining witness Brooke whether the company owning the gas station absorbed any losses from hold-ups while he was on duty, where the witness' answer that it did not was not stricken.

5. Whether the trial judge erred in refusing appellant's request for a jury instruction on impeachment of complaining witness Brooke based on asserted discrepancies in descriptions he gave of his October and December assailants and between these descriptions and appellant's actual appearance, where the descriptions were very similar to each other and to appellant's actual appearance, where appellant's theory that appellant was not the October assailant did not defeat the Government theory that he was the December assailant, where the Court's attention was not specifically directed to evidence supporting a defense theory defeating the prosecution theory as grounds for the request, and where the lack of such an instruction was not prejudicial to appellant.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a six count indictment with offenses arising out of two robbery actions aimed at the same gas station on October 26, 1967 and December 19, 1967. At commencement of trial Judge George L. Hart, Jr. *sua sponte* ordered severance of two counts arising out of the October 26 incident from four counts arising out of the December 19 incident (Tr. 3).[1] On June 4-5, 1968 ap-

[1] The following abbreviations are used throughout this brief:

"Ph."—Pre-trial hearing transcript.
"Tr."—Trial transcript.

pellant was tried before Judge Hart and a jury on the latter four counts, one count being for assault with intent to rob, two for assault with a dangerous weapon, and one for carrying a pistol without a license, in violation of 22 D.C. Code §§ 501, 502 and 3204, respectively. The jury found appellant guilty of assault with intent to rob, guilty on one count of assault with a deadly weapon on the gas station attendant, guilty of carrying a pistol without a license, and not guilty on one count of assault with a deadly weapon. He was sentenced to three to nine years imprisonment for assault with intent to rob, three to nine years for assault with a deadly weapon on the attendant, and one year for carrying a pistol without license, sentences to run concurrently with each other and consecutively with any prior sentence. From that judgment he appeals.

At trial the attendant, James J. Brooke, identified appellant over objection (Tr. 83-84) as having robbed him at gunpoint on October 26 (Tr. 102-103, 108-111) and having tried to rob him again on December 19. Brooke testified that: on December 19 he was alone in the lubrication room adjoining the office on Bladensburg Road when he heard a noise behind him, turned and saw appellant standing in the office door with gun in hand (Tr. 63-64, 72, 100) which he recognized to be an automatic (Tr. 74). Appellant was not pointing the gun directly at Brooke (Tr. 97). Brooke recognized him immediately as one of two men who had held him up earlier (Tr. 81-82, 102-103, 112). Appellant said, "Come on, come on" (Tr. 64). Brooke had a gun in his left rear pocket (Tr. 67). To stall appellant until he could get it out, Brooke asked him "What is this?" and appellant replied, "This is a hold-up. Take your hand out of your pocket" (Tr. 64, 67, 97-98, 112). Brooke took his hand out with his gun in it and fired two shots at appellant without hitting him (Tr. 67). Appellant took two steps to his right, stumbled backwards into the office, and ran out of the front door of the office toward the pumps (Tr. 68, 98). Brooke took a few steps to the large bay doors opening from the lubrication room toward the pumps (Tr. 68-69), lost sight of appellant momentarily, heard ap-

pellant's gun fire accidentally in the office making a hole in the office door facing the pumps which was later found (Tr. 70), and then saw appellant come running from the front office door toward the pumps (Tr. 68-70, 98). He saw appellant drop his hat, stop in an unsuccessful effort to retrieve it, and turn his face toward Brooke as he did so (Tr. 69-70). Appellant was not pointing his automatic at Brooke at that time (Tr. 96). Brooke fired another shot at him without hitting him (Tr. 69). Appellant turned and fired at Brooke without hitting him (Tr. 69, 99) and Brooke fired at appellant again (Tr. 71). Appellant ran out of the station and around a building, heading across Bladensburg Road towards the National Training School (Tr. 71). Brooke lost sight of him as he went around the building (Tr. 71) but shortly saw one man dressed in a white coat up in the wooded area of the National Training School grounds (Tr. 71). Light conditions prevented him from seeing dark blue clothing of the type appellant was wearing at the distance (Ph. 12, 31, Tr. 73). He telephoned police immediately who appeared about three minutes later (Tr. 80).

William E. McGhee, who had been walking his dog near the station, testified that: he heard shots coming from the station and saw two males run out of the station driveway, cross Bladensburg Road, and run into some woods near the National Training School (Tr. 116-117). One wearing a light colored coat was in front; the other dressed in dark clothing ran out of the driveway 5-6 seconds after the first (Tr. 116-117). McGhee cut across to the island in the center of Bladensburg Road when he heard the first shots (Tr. 125), where he was standing when the darkly clothed man crossed Bladensburg Road, saw him, stopped, turned and faced McGhee, and pointed a gun at him from about thirty-two and one half feet (Tr. 118-119, 125-127, 129). McGhee stepped behind a light pole; the darkly dressed man began running again; and both went up a bank and disappeared in the woods (Tr. 119). McGhee saw the gun pointer's face but could not identify him at trial (Tr. 120).

Brooke recovered appellant's hat (Tr. 73, 294). After police arrived he also found two empty cartridge shell casings which had been fired by an automatic like appellant's.[2] He found one shell just outside of the office door and the other ten to fifteen feet outside of the office door facing the pumps (Tr. 77, 79). After police arrival Brooke also recovered a bullet which had struck the hollow magnesium office door facing the pumps (Tr. 78, 294).

A few minutes after his assailant's flight Brooke described him to police as about 6 foot, 150 pounds, and wearing dark blue clothes (Tr. 80-81, Ph. 31) and having no distinguishing facial features (Tr. 88-89).

Arresting Officer Henry C. Connor testified that: he received a radio lookout at 11:15 p.m. for two armed robbery suspects whose descriptions were given, drove to the station, and shortly left in search going east on New York Avenue; half a mile east of Bladensburg Road he saw appellant and another male, later identified as Anthony Whoie, fitting the given descriptions (Tr. 255-257). He left his cruiser to approach on foot with drawn gun, whereupon appellant reached into his belt or jacket; Connor told him to take his hand out; and Connor saw an object drop from his hand (Tr. 258). A minute and a half later Connor recovered a .32 automatic from the spot whose powder smell indicated recent firing (Tr. 258, 267-269). FBI laboratory comparison of the firing pin and the two shell casings recovered at the station showed the shells had been fired from appellant's automatic (Tr. 283-284).

Appellant admitted he fired the automatic at the station. He testified that: he had bought that automatic at about 5:30 p.m. the same evening on 14th Street, N. W. from a boy whose name he did not give (Tr. 319, 327); his friend Anthony Whoie was with him at the purchase (Tr. 328) and later at the station (Tr. 317); he put it in his pocket without examining whether it was loaded or not (Tr. 329); he was getting ready to take it home (Tr. 319, 329); however, he and Whoie had instead visited a friend (Tr. 317, 327-328) and were walking back to catch a bus home at

[2] Brooke's gun was a revolver which did not eject shells after firing (Tr. 73).

Bladensburg Road near the station (Tr. 317) when he and Whoie went into the station to get change for the bus (Tr. 33); he had his hand in his pocket to get change when he spoke to Brooke (Tr. 333); Brooke turned and fired (Tr. 334); as appellant fell back his gun slipped out of his pocket (Tr. 334-335); he grabbed it and fired in the air in the office as he fell against a file cabinet (Tr. 335); he was not aiming at anything and was surprised when the gun went off (Tr. 336); he and Whoie fled through the office and out toward the pumps (Tr. 336-337); he lost his hat but did not turn around to retrieve it (Tr. 337-338); he fired a second shot into the air as he neared or crossed Bladensburg Road, he was again surprised when the gun went off (Tr. 339); he did not see Mr. McGhee or point a gun at anyone; he took his gun from his pants when Officer Connor approached him (Tr. 341).

Admitted into evidence were the automatic and its magazine, the hat, and the bullet slug (Tr. 301-302), as well as the results of FBI laboratory tests showing the shell casings recovered had been fired from appellant's gun (Tr. 283-284).

Immediately before trial Judge Hart held a hearing on photographic identification procedures and ruled that those followed were not suggestive or conducive to mis-identification (Ph. 52). Evidence showed that: At the October 26 robbery appellant and a companion accosted Brooke in the station office, searched him at gun point and took his money, forced him into the adjoining lubrication room, and made him lie face down before effecting escape (Ph. 5-8). Brooke had opportunity lasting three to ten minutes to observe appellant (Ph. 8, 20-21, Tr. 82, 90) and actually observed appellant's unmasked face for one and one-half to two minutes (Tr. 90) by good light (Ph. 6, 9, 11) at three different times, first when appellant came through the door into the office toward Brooke (Ph. 8, 21), second when appellant and his companion searched Brooke (Ph. 8, 21, 23, 38-39) and third when appellant thereafter grabbed Brooke by the arm and pulled him into the lubrication room and made him lie on the floor (Ph. 8-9, 22-23). Brooke heard

appellant speak (Ph. 6-7). He testified at trial he gave police descriptions of his assailants after they departed.

On December 19 appellant was in the station for a total of about three to four minutes (Tr. 87). Brooke had a good look at him (Ph. 33) and saw his face for a total of somewhat more than a minute (Ph. 11-14, Tr. 88) by the same good light by which he had seen him on October 26 (Ph. 10, 13, Tr. 83, 109), from a distance of about fourteen and one-half feet at first view (Ph. 11, Tr. 65) and heard him speak (Ph. 11, Tr. 83). Brooke described the one assailant he saw to police about ten minutes after he fled (Tr. 88).

About midnight on December 19, after the arrest of appellant and Whoie, police officers took Brooke to No. 12 Precinct to view them (Ph. 26). However, officers informed him after arrival he could not then view the two persons they had arrested since no other persons were available to appear in the line-up with them (Ph. 28).

Next morning Detective Robert P. Jones of the Robbery Squad telephoned Brooke requesting he come to No. 1 Precinct (Ph. 28, Tr. 92). Jones had received Brooke's name on December 20 and the case had been assigned to him (Ph. 42). Brooke arrived with another person, not identified (Ph. 42). Jones reviewed with Brooke the reports by previous officers to insure that nothing had been left out of the reports (Ph. 42). He queried Brooke whether he would be able to recognize his December 19 assailant; Brooke replied he would since he was the same man who had robbed him previously (Ph. 42-43). Jones gave him a stack of ten or twelve pictures he had on his desk and asked him to go through them to see whether he recognized anyone (Ph. 43). Brooke was sitting at a desk behind that of Jones (Ph. 46-47). All pictures were in color (Ph. 30). All were of Negro males dressed in street clothes (Ph. 30-31), all of about the same age (Ph. 49).[3] None was dressed in unusual manner (Ph. 36, 48). Appel-

[3] Detective Jones testified that seven pictures which were not available at trial were of persons about the same age (Ph. 50). Nothing indicates that the three which were available were of persons markedly different in age.

lant's picture was neither on top nor on bottom of the stack; it was about halfway down (Ph. 17, 44). Brooke handled them on the desk top himself as he viewed them (Ph. 16). Police officers said nothing to him suggestive or otherwise while he was examining the pictures (Ph. 16). Brooke was not told that the picture of his assailant was in the stack, although he thought it might be (Ph. 36). He knew that two men had been arrested but probably did not know that appellant had been arrested (Ph. 44, Tr. 92). Nothing was said to him as he came to appellant's picture in the stack (Ph. 18, 44, Tr. 113). When he came to it he picked it out without hesitation (Ph. 20, Tr. 113) and told Jones "This is the boy that had the gun and tried to hold me up last night." (Ph. 17, 43). The pictures had markings on the backs (Ph. 45-46); however, Brooke did not look at the back of appellant's picture (Ph. 19, 47). At Jones' suggestion he went through the remaining pictures in the stack but came back to appellant's picture and said that the man pictured there was the assailant (Ph. 43, 45). There was only one picture of appellant in the stack (Ph. 19). It showed appellant in the same jacket he wore the preceding evening (Ph. 32). At the end of the viewing, after Brooke had picked out appellant's picture, Jones said it was one of the persons the police were holding and "I think we have a case." (Ph. 19).

Brooke saw appellant later at a preliminary hearing in the United States Commissioner's Office and identified him (Tr. 37).

The Government did not introduce evidence of the photographic identification initially. Appellant did so in cross-examination of Brooke (Tr. 93-94). At trial only three of the pictures were available; the others may have been taken for use by other members of the Robbery Squad in the interim (Ph. 43-44).

Appellant's motions at conclusion of the Government's evidence (Tr. 302-303) and of all of the evidence (Tr. 344) for judgment of acquittal on all four counts for claimed failure to make out a *prima facie* case were denied. His motion at conclusion of the Government's evidence (Tr.

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303) and at conclusion of all evidence (Tr. 344) for judgment of acquittal on the assault with intent to rob count on grounds that the applicable statute is penal only, not prohibitory, and thus unconstitutional, were denied, as was a motion on similar grounds regarding the assault with deadly weapon count at end of all evidence (Tr. 344).

Appellant requested a jury instruction on impeachment of complaining witness Brooke on the ground that his description of his assailant as read by Officer Householder at trial from an October, 1967 police report (Tr. 298-300) recording Brooke's description assertedly differed from the description Brooke gave the police of his December 19, 1967 assailant. This was denied.

The trial judge sustained Government objection to a question by appellant's counsel on cross examination of Brooke whether the company owning the gas station absorbed any losses from hold-ups while Brooke was on duty; Brooke had already answered that it did not (Tr. 105-106).

ARGUMENT

I. The trial judge did not err in ruling that the photographic identification procedure followed was not conducive to mis-identification.

After exhaustive examination into the circumstances surrounding the pre-trial photographic identification by complaining witness Brooke, Judge Hart ruled that the procedure followed had not been suggestive or conducive to misidentification (Ph. 52). Appellant does not contend that the procedure was shown to be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" making conviction subject to reversal. *Simmons* v. *United States,* 390 U.S. 377, 384 (1968). Appellant contends rather that it was reversible error for the court to rule that the procedure had not been prejudicial to him without having before it all the photographs used in the viewing, not just the three still available. Appellant contends that Brooke identified him on the basis of his blue jacket and blue levis worn when the

picture was taken[4]; appellant conjectures that when Brooke viewed the pictures he may not yet have had the impression that his December assailant was the man who had robbed him in October[5]; appellant bases thereon a contention that it is probable that it was only after Brooke had seen appellant's picture and observed the apparel worn therein that Brooke conceived the idea that it was appellant who had robbed him previously and had returned to try again.[6] He contends it was impossible to bring this fact to light at the hearing without all the pictures available which were used at the viewing. He also contends that the record is unclear whether Brooke saw some writing on the back of appellant's picture at the viewing.[7] His contentions are not well founded.

The record reveals no attempt made by appellant's counsel before the day of trial to have the pictures produced prior to trial pursuant to Rule 16, Fed R. Crim. P. The defense surely knew that photographs had played a role in the identification process. In *Simmons* the Supreme Court rejected a similar claim that it was an abuse of trial court discretion to refuse to stop the trial at defense request to attempt production of all pictures used. There five witnesses were separately shown photographs of a suspect mixed in with other photographs on the day after a bank robbery. All five identified the suspect in photographs and later at trial. In *Simmons,* as here, the photographs were not referred to in the Government's case-in-

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5 Detective Jones testified that Brooke told him before he viewed the pictures that his December assailant was the same man who had robbed him in October (Ph. 42-43). Brooke testified at trial that he recognized appellant immediately on December 19, 1967 as the man who had robbed him previously (Tr. 102-103). This testimony was uncontroverted.

6 Page 11, Brief for Appellant.

7 Brooke testified that he did not look at the back of appellant's picture (Ph. 19). Detective Jones testified that he did not see appellant turn any pictures over (Ph. 47). This testimony was uncontroverted.

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[6] Page 11, Brief for Appellant.

[7] Brooke testified that he did not look at the back of appellant's picture (Ph. 19). Detective Jones testified that he did not see appellant turn any pictures over (Ph. 47). This testimony was uncontroverted.

chief, but were first brought to jury attention in cross-examination of the identifying witnesses. In *Simmons*, as here, the defense had made no attempt before trial date to have the pictures produced before trial. The Supreme Court affirmed conviction, holding that, although the pictures might have been of some assistance to the defense, and although it would have been preferable for the Government to have labeled the pictures shown to each witness, the trial court had not abused its discretion in proceeding without stopping to attempt production of the pictures. In so holding the Court gave weight to the strength of the eyewitness identification which rendered it highly unlikely that non-production caused the defendant any prejudice. 390 U.S. 377, 389. Whatever lesser quantum of strength is present in appellant's case where there is only one identifying eye-witness as opposed to five in *Simmons* is more than compensated for by FBI laboratory comparison of the shell casings found at the crime scene with appellant's gun which conclusively placed appellant at the scene—as indeed did his own admission that he was there at the critical time.

Nor does the fact that in *Simmons* the photographic identification had been made on the day following the crime prior to apprehension of the accused prevent the *Simmons* reasoning and holding from applying to appellant's case. Here the photographic identification took place after apprehension of the two suspects and while they were in custody, it is true—but only after an attempt to hold a lineup allowing corporeal identification within hours after arrest had aborted due to unavailability of enough persons to hold a lineup assuredly meeting due process standards (Ph. 28-30). Brooke, summoned to No. 12 Precinct to view the suspects, was told to go home for this reason (Ph. 28-30).[8]

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[8] P. Wall, *Eye-Witness Identification in Criminal Cases* (1965), cited favorably in *Simmons* v. *United States*, *supra*, says at 70:

> A photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification. Consequently, witnesses should be asked to examine photographs only when a proper corporeal identification is impossible (as where no suspect has yet been

The suspects were held through the night without the valuable confirmation or denial of complicity which a determination of Brooke's ability or inability to identify one of them as his assailant could afford. Had Brooke proved unable to identify appellant as his assailant from photographs, the police would have had to renew the search for the real assailant. Obtaining speedy confirmation or denial that the victim can identify the suspect aids in effective deployment of limited police resources, a factor which was given weight in *Simmons* v. *United States, supra,* at 385. Parallel to this legitimate police interest is that of innocent suspects in demonstrating innocence early on through

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found) or difficult. In any other case, the use of photographs is improper, for it constitutes the unnecessary employment of an identification procedure clearly inferior to one which is available.

Wall continues at 72 that:

> There may be certain circumstances under which it would be completely proper for the police to attempt to obtain a photographic identification even though the person to be identified is already known or in custody. It may be that the nature of the case requires an immediate identification, thus preventing the police from taking the time which is necessary to arrange a fair line-up. Any number of factors may make a proper corporeal identification procedure unfeasible. In such a situation, the use of photographs is not only permissible but preferred, for although a proper corporeal identification is more reliable than a proper photographic one, an improperly obtained corporeal identification is not.

The Supreme Court left no doubt in *Simmons* v. *United States, supra,* of the value to law enforcement it placed upon properly conducted photographic identification when it said:

> Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 390 U.S. 384.

speedy testing of the witness' ability to identify them as the culprit, recognized by this Court in *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723 (1961), *cert. denied*, 368 U.S. 883 (1961) ("confrontation may be beneficial to the accused rather than damaging to him . . . confrontation is thus a precaution against the making of baseless and unfounded charges . . . [although] we do not condone lengthy detention for the purpose of rounding up complaining witnesses so that they may view a suspect—") and by the Supreme Court in *Simmons* v. *United States, supra*, at 384. The effort to hold a lineup having been unsuccessful, the use of photographic identification—shown by exhaustive examination to have afforded fundamental fairness—was appropriate. In avoiding further delay in testing Brooke's ability to identify the arrested suspects, the photographic viewing did not purchase either achievement of legitimate law enforcement ends or fairness to arrested persons at the price of the other. It furthered both. Ruling the photographic identification procedure not conducive to mis-identification was proper under *Simmons* v. *United States, supra*.

II. The in-court identification by the complaining witness had a source independent of the photographic identification: were the photographic identification violative of due process, the in-court identification was not tainted thereby: were introduction of the in-court identification and evidence of the photographic identification error, it was harmless.

Assuming *arguendo* that the photographic identification denied due process, the in-court identification of appellant by Brooke as his assailant would still have been admissible as having an independent source in Brooke's observations during the October and December incidents. Brooke had excellent opportunity to observe his two assailants on October 26, 1967. He saw the unmasked face of the one he identified as appellant for one and one-half to two minutes (Tr. 90) by good light (Ph. 6, 9, 11) at three different times—when appellant came through the

door into the office toward Brooke (Ph. 8, 21), when appellant and his companion searched Brooke (Ph. 1, 21, 23), and when appellant pulled him into the lubrication room by the arm and made him lie on the floor (Ph. 8-9, 22-23). Brooke heard appellant speak (Ph. 6-7). He gave police a description of him after he departed, thus presumably fixing his impression in his mind.

On December 19, 1967 Brooke saw appellant's face for somewhat more than a minute (Ph. 11-14, Tr. 88) of a total of three to four minutes during which appellant was in the station (Tr. 87). He saw him by the same good light as on October 26 (Ph. 10, 13, Tr. 83, 109) from a distance of about fourteen and one half feet at first view (Ph. 11, Tr. 65). Brooke heard him speak (Ph. 11, Tr. 83). He described the one assailant he saw to police about ten minutes after he departed (Tr. 88).

Brooke told Detective Jones on the morning after the December 19 assault before viewing pictures that he would be able to recognize his assailant, describing him as the same man who had robbed him on October 26 (Ph. 42-43). Brooke's impression of his assailant of October 26 and December 19 had thus already crystallized before his viewing of the photographs. It could not have had its origin in that viewing. Appellant's conjecture that Brooke may not have had the impression that his December 19 assailant was also the man who robbed him in October until he saw the pictures[9] requires disregard of a record showing that (1) Brooke stated *before* the viewing that the two men were the same (Ph. 42-43) and (2) Brooke testified firmly that he recognized his December 19 assailant immediately and certainly as one of the men who had robbed him previously (Ph. 11, Tr. 81-82, 102-103, 112).

The independent source for Brooke's in-court identification was thus shown by clear and convincing evidence. Even assuming the photographic identification denied due process, Brooke's initially crystallized impression of appellant and his later in-court identification of him were not

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[9] Page 11, Brief for Appellant.

come at by exploitation of that assumed illegality. See *United States* v. *Wade*, 288 U.S. 218, 241 (1967) ("We think the proper test to be applied in these situations is that quoted in *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) ('[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint')").

Were there no independent source for the in-court identification, and were the viewing violative of due process, the admission of both the in-court identification and evidence of the photographic identification—the latter first introduced by defense counsel during cross-examination of Brooke—would have been harmless error beyond a reasonable doubt. The other evidence that appellant was present at the critical time on December 19 was so overwhelming, including FBI laboratory comparison of shell casings and gun conclusively placing appellant at the crime scene and appellant's own admission that he was there at the time and fired his gun, that any error must have been harmless.

Appellant's contentions should be rejected.

III. The trial judge did not err in sustaining Government objection to defense counsel's question to complaining witness Brooke whether the company owning the gas station absorbs any losses from hold-ups while he was on duty.

Appellant's counsel cross-examiner Brooke extensively on: the gun he had, events during the December incident, his recognition of appellant at that time as his October assailant, the description which Brooke later gave to police, the description he had earlier given of his October assailant, his abortive trip to the precinct in the following hours to view the arrestees, and his photographic identification of appellant on the following morning (Tr. 86-105). The following exchange then took place (Tr. 105-106):

> Q. Okay. Who is responsible for any money that would be missing while you were on duty from a hold-up? Does the company absorb that loss?
>
> A. No.

MR. NUNZIO: Objection, Your Honor.
THE COURT: Sustained.
MR. KEILP: I have nothing further of this witness, Your Honor.

Appellant contends the trial court erred reversibly in limiting cross examination at that point and that counsel was laying a foundation for testing the witness' credibility by showing bias and interest in the outcome. His contentions are not well founded.

The extent of cross examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant[10] to the substantial issues of the case, and of slight bearing on the bias and credibility of the witness, are not reversible error. In respect of needless protraction, undue inquiry into collateral matters to test credibility, and the like, there will be no reversal except for abuse. *District of Columbia* v. *Clawans*, 300 U.S. 617, 632 (1937); *Lindsay* v. *United States*, 77 U.S. App. D.C. 1, 2, 133 F.2d 368, 369 (1942).

Here appellant's inquiry on cross-examination of Brooke into all relevant matters was unrestricted. Only when appellant left the facts of the October and December incidents and the photographic identification to inquire into matters of no or only tenuous relevance did the trial judge in the exercise of his discretion limit inquiry. The jury was well aware that a robbery victim may hold antipathy towards his assailant. To this antipathy towards the man who threatened him with a gun little if anything is added by showing that the victim lost money in addition to being put

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[10] 3 Wigmore Section 944 (3d ed. 1940) notes in pertinent part:

> . . . in extracting evidence [of bias or interest of a witness] by cross-examination the *largest possible scope* shall be given to evidence attempted to be procured in that way; the scope in a given instance being left chiefly to the *discretion of the trial court* . . . .
>
> It may be doubted whether in practical effect this canon enlarges the rules of Relevancy. (Emphasis in original.)

in cold fear of death.[11] Furthermore, there is no reason why the victim's antipathy toward the guilty assailant would prompt him to testify falsely against a person he recognized as innocent. If the financial loss born by Brooke was relevant at all, its weight was so slight that the trial judge cannot be said to have abused his discretion in confining the cross examination to matters more directly in issue. The search for truth was not impaired by being kept from straying so far from the issues.

In any event, appellant was not prejudiced by the court's ruling. Brooke's answer that the company did not absorb the loss went to the jury and was not stricken. Appellant made his point to the extent that it touched the issues. Were the ruling error, it was harmless.

IV. The trial judge did not err in refusing to give a jury instruction requested by appellant on impeachment of complaining witness Brooke.

Officer Householder read at trial a report he wrote in October, 1967 after interviewing Brooke recording Brooke's description of one of his two assailants as 5′ 8-10″, 150 lbs, light complexioned Negro male, wearing a stingy brim brown felt hat and a full length cocoa brown rain coat (Tr. 298-300).[12] Brooke testified he described his December assailant to police as about 6′, 150 lbs, no distinguishing facial features, wearing dark blue clothes (Tr. 80-81, 88-89).

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[11] Financial interest of the witness in the outcome of the court action is evidence of bias which may affect his credibility and is competent on cross examination for the purpose of showing such bias. *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633 (1942), *cert. denied*, 318 U.S. 776 (1943), *reh. denied*, 318 U.S. 803 (1943). In *Villaroman* the defendant sought to show during cross examination of the complaining witness that he had a pending suit against defendant for $50,000 for injuries from the alleged assault. Trial court refusal to allow reference to the suit was held to be an abuse of discretion. Brooke had no comparable financial interest in the outcome of this case.

[12] Householder's report carried Brooke's description of his other October assailant as 5′ 5-6″, 165 lbs, light complexioned Negro male (Tr. 298-300).

Appellant testified he was 6′, 147 lbs (Tr. 343). The Court denied appellant's request for the standard jury instruction on impeachment that the jury could consider Brooke's previous statements only as to credibility, not as to the truth of facts contained therein (Tr. 387).[13] Appellant contends that the description Brooke gave in October of the assailant he later identified as appellant is completely different from the description of appellant he gave to police in December, and that each is completely different from appellant's actual appearance. He contends that refusal to give the requested instruction was reversible error. His contentions are not well founded.

It is questionable indeed whether the October description of 5′ 8-10″, 150 lbs, light complexioned Negro male is completely different from the December description of about 6′, 150 lbs, Negro male with no distinguishing features, or that either is completely different from appellant's description of himself as 6′, 147 lbs. The similarities in these verbal descriptions far outweigh the slight discrepancies. Putting that substantial fact to one side, however, the factual theory of the prosecution was that appellant assaulted Brooke on December 19, 1967. The defense theory, upon which the request for the instruction was based, was that appellant was not the man who had robbed Brooke in October, and that this could be established, in part, from Brooke's own description of the October robber and its asserted inconsistency with the description of appellant he gave in December.[14] Since the defense thory, if believed,

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[13] The request was for Standardized Jury Instruction No. 20, which reads:

> The testimony of a witness may be discredited or impeached by showing that he has previously made statements which are inconsistent with his present testimony. The prior statement is admitted into evidence solely for your consideration in evaluating the credibility of the witness. You may consider the prior statement only in connection with your evaluation of the credence to be given to the witness' present testimony in court. You must not consider the prior statement as establishing the truth of any fact contained in that statement.

[14] Page 19, Brief for Appellant.

did not defeat the prosecution theory, there was no basis for the requested instruction and it was not error not to give it. The general rule applicable here is that:

> It is reversible error for the court to refuse to instruct also as to the defendant's theory of the case. This rule is not confined to cases involving self-defense. . . . or to a special defense such as entrapment . . . or to situations where a lesser offense than that specified in the indictment may be found by the jury . . . ; it applies as well to situations where special facts present an evidentiary theory *which if believed defeats the factual theory of the prosecution.*

Levine v. *United States,* 104 U.S. App. D.C. 281, 282, 261 F.2d 747, 748 (1958) (emphasis supplied).

Here the jury could very well believe that appellant was not Brooke's October assailant and still believe that appellant was the December assailant. To show that appellant did not assail Brooke in October did not defeat the factual theory of the prosecution that he did so on December 19.[15] Since there was no basis for the requested instruction, it was not error to refuse to give it. Nothing in the cases cited by appellant[16] declares that refusal to give the instruction is error where the defense theory upon which the request is based does not defeat the prosecution's theory.

Assuming *arguendo* there was evidentiary support for a defense theory defeating the prosecution's theory to be

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[15] The Government took care to exclude evidence that appellant robbed Brooke in October until appellant had introduced evidence to that effect in cross examination of Brooke (Tr. 101-103, 106-108). Up to that point the Government had introduced evidence only that Brook saw appellant in his station in October, without description of the surrounding circumstances showing robbery.

[16] *Levine* v. *United States, supra, Bartley* v. *United States,* 115 U.S. App. D.C. 316, 319 F.2d 717 (1963); *Wheeler* v. *United States,* 93 U.S. App. D.C. 159, 166-167, 211 F.2d 19, 26-27 (1953); *cert. denied,* 347 U.S. 1019 (1954); *Young* v. *United States,* 114 U.S. App. D.C. 42, 309 F.2d 662 (1962); *Robinson* v. *United States,* 113 U.S. App. D.C. 372, 308 F.2d 327 (1962), *cert. denied,* 374 U.S. 836 (1963).

gleaned from the slight inconsistencies in the descriptions, the Court's attention was not directed to such evidence in support of the request for instruction (Tr. 387). Failure to give the instruction, therefore, would still not have been error. The rule applicable here is that:

> Where there is evidentiary support for special facts sustaining a rational defensive theory, *to which the Court's attention is specifically directed,* the defendant is entitled to have the jury charged on that theory.

Brooke v. *United States,* 128 U.S. App. D.C. 19, 24, 385 F.2d 279, 284 (1967) (emphasis supplied), citing *Young* v. *United States,* 114 U.S. App. D.C. 42, 309 F.2d 662, (1962); *Levine* v. *United States,* 104 U.S. App. D.C. 281, 261 F.2d 747, (1958); *Tatum* v. *United States,* 88 U.S. App. D.C. 386, 190 F.2d 612 (1951); and *McAffee* v. *United States,* 70 App. D.C. 142, 105 F.2d 21 (1939).

At no point does the record show that the slight inconsistencies in Brooke's verbal descriptions were called to the Court's attention as requiring an instruction that the jury could consider those inconsistencies only as to Brooke's credibility, not as to the truth of facts asserted in his descriptions. Nothing in the cases declares that it is error for a trial court to refuse to give an instruction when that Court was not reasonably alerted to the factual predicate underlying the instruction requested, particularly where the theory is as tortured as it is here. This Court in *Belton* v. *United States,* 127 U.S. App. D.C. 201, 207, 382 F.2d 150, 156 (1967) has rather indicated that it cannot assign reversible error to the failure of a trial court to glean and array on its own motion the strained interpretations of evidence put forward by counsel who have mulled over the appeal, but not brought to the trial court's attention when the instruction was requested and denied. Here, it is true, appellant's counsel argued to the jury fully and without limitation that the slight descrepancies in description meant Brooke had seen two different men

in October and December (Tr. 358-363, 367-368)—a fact which makes it impossible to accept appellant's present contention that "the result of the Court's failure to give the requested charge was to remove from the jury's consideration a basic aspect of appellant's defense and, thus, in part, to deny him his right to trial by jury".[17] But at no point was the court reasonably alerted to appellant's strained theory that the slight discrepancies in Brooke's descriptions and between his October description and appellant's actual appearance show that appellant did not rob Brooke in October and thus that he did not assault him in December—and therefore entitled appellant to an instruction that the jury could not consider Brooke's prior statements as establishing the truth of facts contained therein.

In any event, the lack of instruction was not prejudicial to appellant. If in its absence the jury gave such effect to the slight discrepancies as it thought it should, not only as to credibility but as to the actual appearance of Brooke's assailants as well, appellant was surely not harmed thereby.

Appellant's contention should be rejected.

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[17] Page 19, Brief for Appellant.

The court gave the usual instructions as to credibility, including the following at Tr. 376:

> In reaching your conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider any matter that might have a bearing on the subject.
>
> For instance, you may consider the demeanor and behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impressed you as a truth-telling individual, whether the witness impressed you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, whether the witness had a full opportunity to observe matters concerning which the witness testified, and whether the witness has any interest in the outcome of this case.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

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)NALD A. RICHMOND	)	
	)	
Appellant	)	
	)	
v.	)	NO. 22219
	)	
	)	
NITED STATES OF AMERICA	)	
	)	
Appellee.	)	

Appeal from the United States District Court
for the District of Columbia

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Washington, D. C. 20005

Counsel for Appellant
By Appointment of this Court

ebruary 10, 1969

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

RONALD A. RICHMOND, Appellant	)	
v.	)	NO. 22219
UNITED STATES OF AMERICA Appellee.	)	

REPLY BRIEF FOR APPELLANT

I.

Although appellee argues that appellant is foreclosed from challenging the pre-trial identification procedures because he did not, prior to the pre-trial hearing on that subject, request production of the pictures used in the identification procedures pursuant to Fed. R. Crim. P. 16, the argument is not well-founded. First, the facts in Simmons v. United States, 390 U.S. 377 (1968), were unlike those that existed here. In Simmons, the request for production of the pictures was made during trial and under 18 U.S.C. Section 3500, the "Jencks Act." The instant case, however, involved a pre-trial hearing directed specifically to consideration of the propriety of the photographic identification procedure.

Secondly, after Simmons, the government was under an affirmative duty to provide the photographs, unrequested, at the pre-trial hearing so that it could meet the burden of showing that the photographic identification procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. Id. at 38

That the duty lies with the government can be shown not only from the holding in Simmons, but, also, from an understanding of Rule 16. The purpose of Rule 16 is to broaden the defendant's discovery rights. The order of production under the Rule is discretionary with the trial court. And the Rule specifies that the defendant may be permitted to "inspect and copy or photograph" the various items. In the instant case, the hearing was required under Simmons; and it was obligatory that the photographs be present before the court if there was to be a valid ruling on the propriety of the identification procedure.

Finally, if defense counsel could have obtained the pictures under Fed. R. Crim. P. 16 he surely would have done so, for defense Exhibits 1 and 2, at the pre-trial hearing, were two of the pictures which had been shown to Brooke. In view of the government's subsequent admission that it had either lost or misplaced the other pictures, it is apparent that any attempt by defense counsel to obtain the rest of the photographs would have been effectual.

II.

The government seeks to dismiss the important distinction between the instant case and Simmons. In Simmons the perpetrators of a serious felony were at large; and there was an urgency in apprehendin and confining the criminal that might have justified some truncation of the identification procedure. More important, the criminal could not be represented because his identification was not then known. Here, however, no such urgency existed: the suspect was already in custody; and, indeed, the question whether a crime had in fact been committed was still unresolved.

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The fact that the police had tried unsuccessfully to hold a lineup before finally resorting to identification by photograph does not justify the subsequent use of photographic identification if such identification was improperly conducted. Moreover, there was good reason why the police should have waited for a lineup, since the initial evidence strongly indicated that the suspect had been at the gas station that evening. Had a lineup been held, the presence of defense counsel would have been required. United States v. Wade, 388 U.S. 218 (1967).

The inherent dangers of suggestiveness involved in a lineup proceeding are also present when identification is attempted through photographs after a suspect has been apprehended. For at that time, the police have already narrowed the scope of their inquiry and, in their overzealousness to secure a strong identification, may unwittingly communicate to the complaining witness their conviction that the suspect is the perpetrator of the crime. Appellant, therefore, was entitled to have been represented by counsel when the photographic identification proceeding took place. To hold otherwise is to deprive him of that right to cross-examination which is an essential safeguard to his right to confront the witnesses against him.

The government seems to have misconstrued the context in which this argument is raised. Its brief is replete with references to appellant's admission that he was at the gas station in December; and it argues that, for that reason, any error in the pre-trial identification was "harmless". But the significance of the improper identification relates to more than the question of whether appellant was at the gas station at the time of the December incident. The independent source of Brooke's in-court identification of appellant was based on his allegedly having seen appellant at the gas station in October. The ultimate

evidentiary question relating to the December event (i.e. whether appellant was in fact attempting to rob Brooke) depended principally upon whether Brooke did in fact recognize Richmond from the October robbery. The pre-trial identification proceeding was intimately involved in the resolution of this question. For, what if Brooke had selected someone other than appellant as having been at the gas station in December? This would have cast doubt on his testimony that he had recognized appellant; and this, in turn, would have affected the credibility of his testimony that appellant had been attempting to rob him in December.

The probability that Brooke identified appellant from his clothes is pointed up in the pre-trial hearing, when defense counsel showed Brooke one of the pictures from the original stack. Asked if he could recall the picture as having been in the stack, Brooke responded:

> A. I don't remember this particular picture, no, but I know this one was here, and that one was there, and there were others. I had no reason to remember any of these others.
>
> Q. I see. So you wouldn't recall how the men in the other pictures were dressed, would you?
>
> A. This picture, here, I said I'm not sure, I didn't see his face, but he looks like the jacket. (PH. 34) Emphasis added.

The government contends that, even if it be assumed that the photographic identification did not meet due process requirements, "Brooke's initially crystallized impression of appellant and his later in-court identification of him were not come at by exploitation of that assumed illegality." (Appellee's Brief, Pp. 13-14). However, if one grants that the photographic identification procedure was impermissible

without all of the photographs having been made available at the hearing, then the evidence to which instant objection is made (the testimony that Brooke had seen appellant before, in October) is predicated on an illegality.

The government's argument that other evidence which placed appellant at the gas station in December was sufficiently conclusive to render harmless any error in the identification procedure, misses appellant's point. For, as stated above, the appeal from the trial court's ruling regarding identification does not relate solely to the identification of appellant as having been present at the gas station in December. It also challenges Brooke's identification of appellant as the man who robbed the station in October -- an identification that was essential to the prosecution's theory of the case.

III.

The government's argument that defense counsel was exceeding the scope of relevancy when he sought to cross-examine Brooke on the question of who bore the loss from the robberies at the gas station is also not well-founded. The Supreme Court said, in Alford v. United States, 282 U.S. 687, 692, that

> Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them...To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citations omitted.)

In the context of the facts in this case, there is little validity to the claim that a victim's antipathy toward a guilty assailant would not prompt him to testify falsely against a person he recognized as innocent. If Brooke fired upon appellant in the mistaken belief that appellant was a robber, then Brooke had a strong motive for establishing that it was appellant who committed the October robbery. Brooke's desire to have the man who robbed him in October put in jail may have surmounted any uncertainty on his part as to whether appellant was trying to rob him in December or whether it was appellant who had robbed him in October. Moreover, Brooke may have been fearful of prosecution for shooting at appellant in December, if appellant were not found guilty of attempted robbery.

Any financial loss borne by Brooke would have added fuel to these several fires and been especially relevant in showing yet another reason for Brooke to be "trigger happy" in appellant's presence.

To argue that any error in this ruling was harmless is to ignore the basis of so much of the defense case as related to the credibility of Brooke.

IV.

The government also misconstrues appellant's argument relating to the varying descriptions of his assailant which were given by Brooke. Appellant did not argue that the description Brooke gave of appellant in December differed from appellant's actual appearance. Appellant argued that Brooke's description of the man who had robbed him in October differed from appellant's actual appearance.

The prosecution's attempt to establish that appellant had tried to rob Brooke in December was based principally upon Brooke's

testimony, including his identification of appellant as the man who had robbed him in October. The theory of the defense was that the discrepancies between Brooke's October description of the man who robbed him at that time and the description he gave in court of appellant's appearance at the time of the December incident were sufficient to negate the claim that the same person was involved in both incidents.

Although appellee tried to shrug off these discrepancies as "slight", they are not so "slight" when considered in the context of the facts of this case. In October, Brooke had stood next to the taller robber who, he claimed, was appellant. (Tr. 109). This proximity was conducive to Brooke being able to accurately describe the man; and, indeed, Brooke had testified that he himself was 5 feet, 9-1/2 inches tall, and that, if a person standing next to him were his own height, he could so judge. (Tr. 103, 104). It was in this context that he had described the tallest of the October robbers as being between 5 feet 8 inches tall and 5 feet ten inches tall. (Tr. 300). Appellant is 6 feet tall. (Tr. 343).

On the other hand, Brooke's description of appellant's appearance at the time of the December incident was correct, -- both as to height and to weight; and Brooke was able to make this description even though, at that time, he and appellant had been no closer to each other than 14 feet. (PH. 11, Tr. 65). Moreover, the argument that the discrepancies are slight between a description of a man as 5 feet, 8-10 inches tall, 150 pounds (as Brooke described the October robber) and a description of a man as 6 feet, 150 pounds (which is appellant's build) ignores the fact that the body structure would vary noticeably between two such persons.

If Brooke's evidence is accepted--as it must be--there is virtually no possibility that appellant was the same man who Brooke described as the taller of the October robbers.

WHEREFORE, appellant respectfully requests this Court to reverse the decision of the Court below, and (1) direct that a verdict of acquittal be granted, or remand this case for a new trial; or (2) remand this case for a new trial--with the direction that a hearing de novo be held on the propriety of the pre-trial identification of the appellant.

Respectfully submitted,

February 10, 1969

By_____

E. Theodore Mallyck
621 Colorado Building
Washington, D. C. 20005
Attorney for Appellant
(appointed by this Court)

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CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Reply Brief have been personally delivered to the office of the United States Attorney for the District of Columbia, Room 3600, United States Court House, Third Street and Constitution Avenue, N.W., Washington, D. C., this 11th day of February, 1969.

E. Theodore Mallyck

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

RONALD A. RICHMOND Appellant, v. UNITED STATES OF AMERICA, Appellee.	)	NO. 22219

Appeal from the United States District Court
for the District of Columbia

E. Theodore Mallyck
Mallyck & Bernton
621 Colorado Building
1341 G Street, N. W.
Washington, D. C. 20005

Counsel for Appellant
By Appointment of this Court

December 3, 1968

ISSUES PRESENTED

In the opinion of appellant the questions are:

(1) Whether the absence of certain photographs at the pretrial photographic identification hearing was prejudicial to the appellant, and therefore:

a) The argument made at the hearing that the Government had the burden of coming forward with the pictures was erroneously rejected by the Court; and

b) The Court erroneously ruled that the photographic identification procedure was not conducted under such circumstances as to be suggestive and conclusive to mis-identification.

(2) Whether objections to certain questions defense propounded to the complaining witness, in order to ascertain a possible motive or interest for falsifying testimony, were erroneously sustained.

(3) Whether the Court's failure to give a requested instruction to the jury regarding the impeachment of a prosecution witness, after another prosecution witness had given testimony tending to contradict the former witness, was prejudicial error.

The pending case has not previously been before this Court.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RONALD A. RICHMOND, Appellant	)	
v.	)	NO. 22219
UNITED STATES OF AMERICA Appellee.	)	

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Judgment was entered in the District Court on June 5, 1968, finding appellant guilty of one count of assault with intent to commit robbery, one count of assault with a dangerous weapon, and one count of carrying a dangerous weapon without a license. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

The appellant, Richmond, and a companion were arrested at approximately 11:30 P.M. on December 19, 1967, as suspects for attempted robbery and assault with a dangerous weapon. Following a preliminary hearing before a United States Commissioner, a Grand Jury indictment was returned against Richmond on January 2, 1968, charging him in six counts: one count of

robbery, one count of attempted robbery, three counts of assault with a dangerous weapon, and one count of carrying a dangerous weapon without a license. The robbery count and one of the counts of assault with a dangerous weapon related to an occurrence of October 26, 1967. The others grew out of an incident that occurred on December 19, 1967.

At a pretrial hearing on photographic identification procedure, on June 4, 1968, the Court, Judge George L. Hart, Jr., presiding, ordered a separate trial held on those counts that related to the incident of October 26, 1967. The Court then ruled that the photographic identification procedure, relating to the December events, had not been prejudicial to the appellant.

Trial by jury on the counts involved in the December incident was begun on June 4, 1968 and, during the course of trial, defense counsel objected to the in-court identification of Richmond, by the complaining witness, Brooke. This objection was overruled. The Government, in turn, objected to certain of defense counsel's questions, directed to Brooke, which were intended to elicit a motive or interest that would have been relevant to the impeachment of his testimony. These objections were sustained.

On the second day of trial, defense counsel moved for a continuance on the ground that the publicity attending Senator Kennedy's murder (which had occurred the previous day) would be prejudicial to the defendant. This was denied. Defense counsel -- at the close of the prosecution's case and again at

the close of all the evidence -- moved for acquittal on all four counts on the ground that the Government had not made a prima facie case and for acquittal on the count of assault with intent to commit robbery on the ground that the statute is penal only, not prohibitory, and therefore unconstitutional. At the close of all the evidence, he also moved for judgment of acquittal on the count of assault with a deadly weapon, on the ground that the statute is not prohibitory and is, therefore, unconstitutional. All such motions were denied.

Defense counsel requested that the jury be given a charge on impeachment of a prosecution witness on the ground that certain of Brooke's identification testimony had been impeached by the testimony of another prosecution witness; and he excepted when the Court did not give the charge.

The jury returned a verdict of guilty on all counts except one of the counts of assault with a dangerous weapon.

Motion for a new trial was filed by defense counsel on June 13, 1968, on the ground that the Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence, that the verdict was contrary to the weight of the evidence, that the verdict was not supported by substantial evidence, that the Court erred in sustaining objections to questions addressed to the witness Brooke, that the Court erred in charging the jury and in refusing to charge the jury as requested, and that the defendant was substantially prejudiced and deprived of a fair trial because the Court failed to grant

an adjournment on account of the publicity attending the assassination of Senator Robert Kennedy and because the Court failed to suppress a prejudicial identification of the defendant by the complaining witness Brooke. This motion was denied by the Court on June 14, 1968.

Statement of Facts

On December 19, 1967, at approximately 11:00 P.M., the complaining witness, Brooke, was in the lubrication room of the gas station where he worked. The appellant, Richmond, appeared in the doorway between that room and the outer office and called to Brooke. The testimony is in dispute as to whether Richmond had a gun in his hand when he first spoke to Brooke and whether he intimated an intent to rob Brooke. (PH. 10-12; Tr. 64-65, 318-319)*. It is, however, undisputed that Brooke drew a revolver from his back pocket and fired at Richmond, that Richmond fell backwards into the office, that by then Richmond did have a gun in his hand and that that gun thereupon discharged. (PH.12; Tr. 68-70, 318-319).

Brooke then went to the outer bay doors of the lubrication room and again fired at Richmond, who had fled to the gas pumps in the front of the station. Richmond returned Brooke's fire and fled across the street. He then ran up a hill and into

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*The following abbreviations are used throughout this brief:

"PH" - Pretrial Hearing, transcript.
"Tr" - Trial, transcript.

the woods, following a companion who, he claims, was with him at the gas station but whom Brooke claims he had not previously seen.

Brooke reported the incident to the police; and Richmond was arrested shortly thereafter by Officer Connor of the U. S. Park Police.

When Brooke made his report to the police he described the suspect as being a Negro male of 21 years, six feet tall, weighing approximately one hundred and fifty pounds, and having a mustache. (PH. 24-25; Tr. 80-81). This was an accurate description of Richmond, (who is also rather dark-complected). Brooke also emphasized that the man was wearing dark blue clothes. (PH 12-31; Tr. 72, 80, 94). Around midnight that same night, Brooke was informed by the police that they had arrested two suspects; and he was asked to go to the Twelfth Precinct and make an identification, if he could. When he arrived at the precinct, he was told that, because there were only the two suspects available, a lineup could not be conducted. He then returned to work.

He was called to the First Precinct the next morning by Officer Jones, of the Metropolitan Police Department, Robbery Squad, and he went through some snapshots in Jones's presence. Brooke selected Richmond's picture from the stack. It was alleged by Brooke and Jones that there were ten or twelve colored Polaroid photographs, and that they were all of Negro males in street

clothes. (PH. 15-16, 30-31, 43, 48-49; Tr. 94-95). When he selected Richmond's picture from the others, Brooke also claimed he recognized Richmond as the person who had robbed him at the gas station on October 26, 1967, less than two months earlier. (PH. 19, 45). However, at the time of that crime, Brooke had described that robber as being a Negro male of about twenty years, between five feet, eight inches, and five feet, ten inches, tall, weighing approximately 150 pounds, and having a light complexion. (Tr. 300).

At the pretrial identification hearing held pursuant to the rule of the Simmons case (390 U.S. 377), it appeared that all but three of the photographs which had been shown to Brooke at the First Precinct were no longer available, and that neither Officer Jones nor Brooke could remember whether any of the men in the photographs, other than Richmond, wore dark blue clothing. (PH. 31, 34, 36, 43-44, 49-50; Tr. 94). Defense counsel argued that it was the Government's duty to come forward with the pictures to show that the identification in which they had been used had not been prejudicial to Richmond. (PH. 50-51). The Court rejected this argument and ruled that there was no evidence that the identification procedure had been held under such circumstances as to be suggestive and conducive to misidentification, but to the contrary, had been conducted in a manner without any prejudice or any tendency to misidentify Richmond. (PH. 52).

Brooke subsequently identified Richmond in court as the man who, he claimed, had tried to rob him. (Tr. 83-84).

Brooke testified that he had been held up on four previous occasions; but when defense counsel asked him if he had a permit for the pistol with which he had shot at Richmond and questioned him as to whether he had to bear the loss from these robberies, the questions were objected to and the objections were sustained. (Tr. 87, 105).

During the trial, Officer Householder, of the Metropolitan Police Department, read from his report Brooke's description of the October robber, which was at variance with the description Brooke gave of Richmond in December. (Tr. 300).

STATUTES

"Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years." Mar. 3, 1901, ch. 854, Section 803, 31 Stat. 1321 (now D.C. Code Section 22-501, amended December 27, 1967).

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years." D.C. Code Section 27-502 (1967)

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years." D.C. Code Section 22-3204 (1967)

SUMMARY OF ARGUMENT

I.

It was reversible error for the District Court to rule at the pretrial identification hearing that the photographic identification procedure had not been prejudicial to the appellant, Richmond, without having before it the photographs themselves upon which defense counsel might base his pretrial cross-examination.

The facts that were primarily in issue below were (1) whether Richmond had a gun in his hand when he first spoke to Brooke in the December incident; (2) whether Richmond said 'this is a holdup' or merely called out to Brooke; and (3) whether Brooke correctly recognized Richmond as the person who had robbed him in October. If Brooke could have been shown to be in error in his identification of Richmond as the man who had previously robbed him, there would have been a basis on which to question the credibility of his testimony with respect to the other aspects of the December incident.

Except for the statement that he was wearing dark blue clothes, Brooke's description of the December suspect lacked specificity. Thus, when Brooke went through the photographs, it may have been that he picked out Richmond solely because the photograph showed him wearing dark blue clothes; and that his identification of Richmond as the one who had been at his gas station that evening may also have triggered his identification of Richmond as the one who had robbed the station in October.

Without an opportunity to examine the photographs, defense counsel could not effectively cross-examine Brooke on the process by which he had purported to identify Richmond, nor could the Court determine whether the procedure followed was a proper one.

II.

It was reversible error for the District Court to sustain the prosecution's objections to the questions which defense counsel put to Brooke relating to whether the company that owned the gas station, or he as the employee on duty at the time of the prior robberies, had borne the loss of these robberies.

With these questions, defense counsel was attempting to show a motive or interest that Brooke might have had in obtaining Richmond's conviction and which would have been relevant to questioning the credibility of his testimony.

III.

It was reversible error for the District Court to fail to give the jury the standardized instruction regarding impeachment of a prosecution witness as requested by counsel for the defense.

Brooke had, of course, claimed to have recognized Richmond as the man who had robbed him in October. However, the description of the robber that he had given Officer Householder at the time in no way coincided with the description of Richmond which he gave the police after the December incident. This inconsistency alone entitled appellant to the charge as requested.

ARGUMENT

I. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO SUPPRESS THE PHOTOGRAPHIC IDENTIFICATION, BECAUSE THE UNAVAILABILITY TO DEFENSE COUNSEL AND TO THE COURT OF ALL THE PHOTOGRAPHS SHOWN TO THE IDENTIFYING WITNESS MADE IT IMPOSSIBLE FOR COUNSEL TO EFFECTIVELY CROSS-EXAMINE. [See PH. 5-39, 41-52; Tr. 63-84, 86-98, 100-115, 292-301, 316-344].

The complaining witness, Brooke, had based his testimony primarily upon the contention that he had previously been robbed by the appellant, Richmond, in October and that he therefore immediately recognized Richmond in December. This supposed recognition is crucial to the entire case, for, if Richmond was not the perpetrator of the October robbery, the claim that he intended to rob the gas station when he came there in December would have had only indirect circumstantial support.

Yet, the substantial variance between the description of the October robber which Brooke gave to the police at that time and the description he gave of Richmond when he reported the December incident raises a serious doubt that Richmond was the man who had committed the October robbery. Brooke had stood and walked alongside the man who had robbed him in October. (PH. 7-9, 20-23; Tr. 81-82, 90-91, 105-106, 109-111). He was in Richmond's presence a much shorter time. Brooke testified that he may have erred in the description he gave in October because the man had worn a hat, yet Richmond was also wearing a hat when Brooke saw him in December. (Tr. 69, 105). Thus, having seen Richmond

for a much shorter period of time, from greater distances, and under the excited circumstances of exchanging gunfire, Brooke still gave a description that closely approximated Richmond's appearance. Absent the possible suggestiveness of the identification procedure, Brooke might not have so conclusively named Richmond, and the jury might have consequently been dubious.

When, after the December incident, Brooke went to the police station to look at the photographs the police had for him to examine, he may not yet have had the impression that the man from the night before was also the one who had robbed him in October. Who can say what was the state of his mind at that time? There is no indication in the record, other than the hearsay statement by Officer Jones at the pretrial hearing, (PH. 42-43), that Brooke claimed to have recognized Richmond until after he was shown the photographs. It is, therefore, wholly probable that it was only after he had seen Richmond's picture, had observed the apparel he was wearing in the picture, and had compared Richmond's features with his recollection of what the man who robbed him in October looked like that Brooke conceived the idea that it was Richmond who had robbed him previously and had returned to try again. It was, therefore, essential for the identification procedure to have been conducted so as to avoid giving any suggestions to Brooke.

The fact that, out of the ten or twelve photographs shown Brooke at the police station, only three were available

at the identification hearing, resulted in defense counsel being unable to effectively challenge the accuracy and credibility of the witness's identification. Brooke identified Richmond's picture (which was in color) on the basis of his blue jacket and blue Levis. Without all of the other pictures, defense counsel could not show whether or not any of the other subjects had been dressed in the same way.

The United States Supreme Court has recognized the dangers to the accused when his counsel is prevented from effectively investigating the pretrial proceedings on which he is committed to trial. The Court said, in United States v. Wade, 388 U.S. 218, 224 (1967), that the Constitutional guarantee of the right to counsel "encompasses counsel's assistance whenever necessary to assure a meaningful defense." In elaboration, the Court went on to say that:

> Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right to cross-examination which is an essential safeguard to his right to confront the witness against him. ... And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Id. at 235.

Applied to the instant case, this means that the unavailability of the photographs for the identification hearing rendered defense counsel unable to effectively cross-examine Brooke and

Officer Jones and thus made any approval by the Court of this procedure subject to reversal.

What the Supreme Court said with respect to pretrial confrontations applies equally well to photographic identifications:

> But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. ...[T]he defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. ...[T]he participants' names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. Id. at 229-230.

Without the photographs to assist him, defense counsel was in the same position at the identification hearing. He could not reconstruct what the photographs depicted; there was no record of who they represented or how they were dressed; and it is unclear from the record what the writing was on the back of the pictures and whether Brooke saw it or not.

As one commentator has suggested,

> the photographs used should be collected together and kept, so that they can be produced later in court if necessary to rebut any suggestion that the photograph of the suspect was unfairly distinctive in any way. Williams, Identification Parades, [1955] Crim. L. Rev. (Eng.) 525, 530

This appears to be a minimal requirement!

On the facts in Simmons v. United States, 390 U.S. 377 (1968) the recent Supreme Court case which dealt with the applicability of Wade to photographic identifications, the Court

found that the use of photographs had not been unduly prejudicial. However, that case is easily distinguished from the instant one. In Simmons, all five eyewitnesses had independently and unanimously identified the suspect from snapshots, whereas here there was only one witness, with no one else to confirm or dispute his recollection. Furthermore, in Simmons, the identification had been made before any suspect had been arrested so that no line-up could be held.

In the instant case, notwithstanding that the suspect had already been arrested, the police did not hold a line-up so that Brooke might view the suspect in person. And, yet, aside from the fact that it was when Brooke first went to the police station, no reason is given in the record why a line-up could not have been held.

The impropriety of using photographs for identification purposes when other means are available has been noted by a commentator oft-quoted in Wade:

> Witnesses should be asked to examine photographs only when a proper corporeal identification is impossible (as where no suspect has yet been found) or difficult. In any other case, the use of photographs is improper, for it constitutes the unnecessary employment of an identification procedure clearly inferior in reliability to one which is available. P. Wall, Eye-Witness Identification in Criminal Cases, 70 (1965).

The Court held in Simmons that

> each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so

> impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 390 U.S. at 384..

But, as has been shown above, there could have been no proper determination of the suggestiveness in the instant case without the photographs themselves being before the Court.

In a recent case out of the United States District Court for the District of Columbia, the Simmons case was construed, and the Court suppressed any in-court identification based on the photographic identification. The Court said,

> There were indications that the police felt defendant was the robber and the evidence convinces this Court that in their over-zealousness to secure a strong identification this thought was unwittingly communicated to the complaining witness. United States v. Trivette, 284 F. Supp. 720,723 (D.C. D.C. 1968).

The Court went on to conclude:

> The initial decision as to the reliability of the identification procedure is within the discretion of the trial court which has the unique opportunity to get the "feel" of the case and to evaluate the witnesses. Id. at 724.

The Court in the instant case, however, could not properly make an initial decision on the reliability of the identification procedure, because it did not have the pictures before it; whereupon to judge any possibly impermissible suggestiveness. To hold that defense counsel can effectively cross-examine the eyewitness at the identification hearing without having the photographs available is akin to arguing that counsel could effectively represent a defendant at an identification hearing based upon a lineup identification, when counsel had not been present at the lineup. Just as the Court could not make an initial decision of propriety in the latter case, neither could it do so in the former. For, in

either event, the defendant's right to the assistance of counsel for his defense is being effectively denied him. And any judicial determination otherwise is reversible error.

II. IT WAS PREJUDICIAL ERROR FOR THE COURT TO REFUSE TO ALLOW DEFENSE COUNSEL TO QUESTION BROOKE ON WHO BORE THE LOSSES OF THE ROBBERIES AT HIS STATION. [See TR. 86-87, 105].

Defense counsel, seeking to elicit a possible motive for Brooke to falsely implicate Richmond with an earlier robbery through the endeavor to convict appellant of attempted robbery in the instant case, asked Brooke if the company absorbs the loss from robberies. Although Brooke answered, "No," the Government's objection to the question was sustained.

This was error, for defense counsel was laying a foundation for testing the witness's credibility. The right of reasonable latitude in cross-examination has long been recognized. Alford v. United States, 282 U.S. 687 (1930). A witness may be cross-examined regarding facts tending to show bias for or against a party or his willingness to be unscrupulous in giving testimony, for impeachment purposes. Ewing v. United States, 77 U.S. App. D.C. 14,21, 135 F. 2d 633,640 (1942), cert. denied, 318 U.S. 776, rehearing denied, 318 U.S. 803.

As the Court said in Villaroman v. United States, 87 U.S. App. D.C. 240,241, 184 F. 2d 261, 262 (1950), quoting with emphasis from State v. Decker, 161 Mo. App. 396, 143 S.W. 544:

> A wide range of cross-examination should be allowed to show the motive, interest, or animus of a witness. * * * The jury have the right both in civil and criminal cases to consider the interest which the witness may have in the result of the litigation.

Now, it was certainly possible that the witness, Brooke, had a motive or an interest in having Richmond convicted: Brooke

had been subjected to the humiliating and frightening experience of having been robbed several times, and he had had injury added to insult by having had to make good the money lost. As the Court said in Wade, "Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives." 388 U.S. at 232-233.

This was also mentioned by Wigmore: "[A] witness in a criminal case, as well as in a civil case, may have a motive to testify falsely about a particular matter." 3 Wigmore, Evidence, Section 967, 3rd Ed. 1940. And, "that a witness, not a party, is the injured person in a prosecution for a crime may indicate a bias for the cause." Id. Section 969.

Thus, it is apparent that sustaining the objection to defense counsel's questions was irreparably harmful to counsel's efforts to impeach the credibility of the prosecution's chief witness, which, in turn, was basic to the defense's case.

III. IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO REFUSE TO GIVE THE JURY THE STANDARDIZED INSTRUCTION REGARDING THE IMPEACHMENT OF A PROSECUTION WITNESS AFTER THAT WITNESS'S CREDIBILITY HAD BEEN PUT IN QUESTION BY EVIDENCE OF HIS PRIOR INCONSISTENT STATEMENT. [See TR. 296-301].

In refusing to charge the jury as defense counsel had requested, the Court committed prejudicial error. The request was for Standardized Jury Instruction No. 20 - Impeachment by Prior Inconsistent Statements.

either event, the defendant's right to the assistance of counsel for his defense is being effectively denied him. And any judicial determination otherwise is reversible error.

II. IT WAS PREJUDICIAL ERROR FOR THE COURT TO REFUSE TO ALLOW DEFENSE COUNSEL TO QUESTION BROOKE ON WHO BORE THE LOSSES OF THE ROBBERIES AT HIS STATION. [See TR. 86-87, 105].

Defense counsel, seeking to elicit a possible motive for Brooke to falsely implicate Richmond with an earlier robbery through the endeavor to convict appellant of attempted robbery in the instant case, asked Brooke if the company absorbs the loss from robberies. Although Brooke answered, "No," the Government's objection to the question was sustained.

This was error, for defense counsel was laying a foundation for testing the witness's credibility. The right of reasonable latitude in cross-examination has long been recognized. Alford v. United States, 282 U.S. 687 (1930). A witness may be cross-examined regarding facts tending to show bias for or against a party or his willingness to be unscrupulous in giving testimony, for impeachment purposes. Ewing v. United States, 77 U.S. App. D.C. 14,21, 135 F. 2d 633,640 (1942), cert. denied, 318 U.S. 776, rehearing denied, 318 U.S. 803.

As the Court said in Villaroman v. United States, 87 U.S. App. D.C. 240,241, 184 F. 2d 261, 262 (1950), quoting with emphasis from State v. Decker, 161 Mo. App. 396, 143 S.W. 544:

> A wide range of cross-examination should be allowed to show the motive, interest, or animus of a witness. * * * The jury have the right both in civil and criminal cases to consider the interest which the witness may have in the result of the litigation.

Now, it was certainly possible that the witness, Brooke, had a motive or an interest in having Richmond convicted: Brooke

had been subjected to the humiliating and frightening experience of having been robbed several times, and he had had injury added to insult by having had to make good the money lost. As the Court said in Wade, "Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives." 388 U.S. at 232-233.

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In refusing to charge the jury as defense counsel had requested, the Court committed prejudicial error. The request was for Standardized Jury Instruction No. 20 - Impeachment by Prior Inconsistent Statements.

> The testimony of a witness may be discredited or impeached by showing that he has previously made statements which are inconsistent with his present testimony. The prior statement is admitted into evidence solely for your consideration in evaluating the credibility of the witness. You may consider the prior statement only in connection with your evaulation of the credence to be given to the witness' present testimony in court. You must not consider the prior statement as establishing the truth of any fact contained in that statement.*

The request for this charge was based on the testimony of Officer Householder, who read to the Court the description Brooke had given the police in October of the man who had robbed him at that time. That description was completely different from the description of Richmond which Brooke gave the police in December and, also, from Richmond's actual appearance. This discrepancy, coupled with Brooke's insistence that the two men whom he had described so differently, were, in fact, the same -- was sufficient to seriously put in question Brooke's credibility. Appellant was entitled to have the jury so charged.

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*Bartley v. United States, 115 U.S. App. D.C. 316, 319 F. 2d 717 (1963); Wheeler v. United States, 93 U.S. App. D.C. 159, 166-167, 211 F. 2d 19, 26-27 (1953), cert. denied, 347 U.S. 1019; Young v. United States, 94 U.S. App. D.C. 62, 214 F. 2d 232 (1954); Robinson v. United States, 113 U.S. App. D.C. 372, 308 F. 2d 327 (1962), cert. denied, 374 U.S. 836; 14 D. C. Code Sec. 104.

The theory of the prosecution was that Richmond had approached Brooke with his gun drawn in an attempt to rob him. This theory would be entitled to credence if, as Brooke claimed, Richmond had been the man who robbed Brooke in December. The theory of the defense was that Richmond was not the man who had robbed Brooke in October and that this could be established, in part, from Brooke's own description of the October robber and its inconsistency with the description of Richmond he gave the police in December.

As this Court said in Levine v. United States, 104 U.S. App. D.C. 281, 282, 261 F. 2d 747,748 (1958):

> [I]t is reversible error to refuse on request to instruct also as to defendant's theory of the case. This rule applies as well to situations where special facts present an evidentiary theory which if believed defeats the factual theory of the prosecution * * *.

It is, therefore, clear that the result of the Court's failure to give the requested charge was to remove from the jury's consideration a basic aspect of appellant's defense and, thus, in part, to deny him his right to trial by jury.

CONCLUSION

On the basis of the foregoing, appellant respectfully requests this Court to reverse the decision of the Court below, and (1) direct that a verdict of acquittal be granted, or remand this case for a new trial; or (2) remand this case for a new trial -- with the direction that a hearing de novo be held on the propriety of

the pre-trial identification of the appellant.

Respectfully submitted,

E. Theodore Mallyck
Attorney for Appellant
(Appointed by this Court)

December 3, 1968

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Brief have been personally delivered to the office of the United States Attorney for the District of Columbia, Room 3600, United States Court House, Third Street and Constitution Avenue, N. W., Washington, D. C., this 3rd day of December, 1968.

E. Theodore Mallyck

CHRONOLOGICAL LIST OF EXHIBITS AND PAGES OF TRANSCRIPT DEEMED NECESSARY BY APPELLANT'S COUNSEL FOR THE COURT TO REVIEW

I. Preliminary Hearing

(a) Pages of Official Transcript:
pp. 4-39; 41-52.

II. Trial

(a) Pages of Official Transcript:

(i) Volume I
pp. 61-115

(ii) Volume II
pp. 292-304; 316-344;
370-387.